

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATE OF PRONOUNCEMENT: JUNE 5, 1998

BEFORE

THE HON'BLE MR. JUSTICE B.N. MALLIKARJUNA

WRIT PETITION No. 22572/1994

BETWEEN:

The Kanara District Central Co-operative Bank Ltd., Sirsi,
represented by its Managing Director Sri. N.P. Goankar ... PETITIONER

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(By Advocate Sri. S.R. Hegde Hudlamane)

AND:

1. The North Kanara District Co-operative Fishing Marketing Federation Ltd., represented by its Managing Director.
2. The State of Karnataka, represented by its Secretary, to Rural Development and Co-operation Department, Vidhana Soudha, Bangalore.
3. The Joint Registrar of Co-op. Societies, Belgaum Division, Belgaum.
4. The Karnataka Appellate Tribunal, represented by its Secretary, M.S. Building, Vidhana Veedi, Bangalore-1. ... RESPONDENTS

(By Advocate Sri. G. Balakrishna Shastry for R-1)
(Sri. Karigannanavar, HCSP for R-2 to 4)

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This writ petition is filed under Arts. 226 and 227 of the Constitution of India to quash the impugned judgment and award passed by

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R-4 in Appeal No.277/91 dt:22.2.94 at Annexure-H thereby confirming the Judgment and award passed by R-3 at Annexure-F at dispute No.3/JRL/DAM/32/86-87 dated 23.3.91 and etc. and to direct R-3 & 4 to pass judgment and award as per Annexure-F in dispute No.JRL.DAM.32/86-87.

This petition coming on for hearing, having reserved for orders, made the following:

O R D E R

The Kanara District Central Co-operative Bank Ltd., Sirsi, hereinafter referred to as petitioner, has challenged in this writ petition under Arts.226 and 227 of the Constitution of India the order of the Joint Registrar of Co-operative Societies, Belgaum Division (R-3) in dispute No.B/JRL/DAM/32/1986-87 dated 23.3.1991 and also the common order of the Karnataka Appellate Tribunal (R-4) dated 22.2.1994 in Appeal Nos.271/91 and 277/91 confirming the order of R-3. R-2 is the State of Karnataka by its secretary.

2. Heard the learned counsel for the petitioner and also the learned Govt. Pleader for R-2 to 4.

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3. Few facts relevant for the disposal of this writ petition may be stated thus:

R-1 is the North Kanara District Co-operative Fishing Marketing Federation, hereinafter referred to as R-1 or federation. It would appear that R-1 & 2 are the members of the petitioner, an institution established under the provisions of the Karnataka Co-operative Societies Act. It would appear that in about the year 1967 State of Karnataka floated the scheme for development of fisheries in the Districts of both South Kanara and North Kanara. The object of the scheme was to advance loans to the federation in both the districts through the co-operative institutions, for being distributed amongst the fishermen in the locality for the purchase of mechanised boats for setting up of fish meal plant etc. The scheme was that the Karnataka State Co-operative Apex Bank to advance loan to the petitioner with an understanding that it had to advance to the federation R-1 repayable with certain terms and conditions. Petitioner agreed to implement the scheme and accordingly wrote a letter to the Director of Fisheries in Mysore-Bangalore, Annexure-A is the letter. It

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agreed to implement the schedule subject to the condition that the Government should build cold storage plant at Karwar and the repayment of loan together with interest should be guaranteed by the Government. Annexure-A is the said letter. After certain discussion, Government of Mysore (as it called then) agreed to the proposal and accordingly drew up proceedings dated 22.11.1967, Government agreed to guarantee repayment of the principle and the payment of interest on the loan to be advanced both by the Apex Bank and the petitioner to the North Kanara District Co-operative Fishing Marketting Unit Ltd., Karwar under the scheme. Annexure-B is the proceedings of the Government of Mysore dated 22.11.1967.

4. It is undisputed that pursuant to these proceedings petitioner advanced loan of Rs.43 lakhs to R-1 for the purchase of 100 boats during the years 1968-69, 1969-70 and 1970-71. One of the terms of the agreement was that this amount together with interest should be repaid in 8 equal instalments. It is stated that R-1 failed to pay the entire sum. However, it would appear

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that the petitioner repaid a sum of Rs.3,98,000/-as on 27.6.1977 to the State Apex Bank which had advanced loan to the petitioner.

5. Since R-1 failed to make payment, it appears the petitioner approached the State of Karnataka and accordingly a meeting was held in the Chambers of Minister for Co-operation on 27.6.1977 to work out the modalities of the programme for repayment of the debt due. It is stated that amongst other terms and conditions, it was agreed that the petitioner-bank should repay their overdues to the Apex Bank in ~~2~~ 5 years term loan and the Apex Bank should charge interest at 9%. It was agreed that the D.C.C. Bank should give 8 years time for repayment of the loan, Annexure-C is the proceedings of the meeting dated 27.6.1977 drawn by the Under-Secretary to Government, Rural Development of Co-operation Department. It would appear that even thereafter R-1 failed to make payment and therefore petitioner by issuing notice on 10.10.1983 invoked the guarantee and asked to repay the principal together with interest as agreed in the meeting held on 27.6.1977. There

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was no repayment and therefore petitioner raised the dispute before R-3 under Sec.70 of the Karnataka Co-operative Societies Act,1959 in dispute No.B/JRL/DRM/32/1986-87. State Government and as well R-1 filed their counter, they were represented by their respective counsel, evidence was let in by all the parties concerned and R-3 by order at Annexure-F dated 23.3.1991 directed R-1 federation to pay the petitioner a sum of Rs.30,66,280-00 towards principle and Rs.13,62,021-20 towards interest calculated upto 7.5.1987 together with future interest on principle at 11% p.a. till the date of realisation and also ordered arbitration costs of Rs.165-00.

6. Aggrieved by this order, both petitioner and R-1 filed appeals under Sec.105 of the Karnataka Co-operative Societies Act before R-4, appeal No.277 and 271/1991 are the appeals filed by the State and R-1 respectively. The tribunal after hearing the arguments, by order dated 22.2.1994 Annexure-H dismissed both the appeals. R-3 rejected the claim against the State Government and that was confirmed in appeal *h/n*

by R-4 holding that the petitioner can proceed independently of Sec.70 by invoking the guarantee in the event of R-1 failing to repay the principle as per the award. These orders are under challenge in this writ petition. It would be useful to note that R-1 federation has not challenged the common order dismissing its appeal 271/91.

7. Learned counsel for the petitioner vehemently argued that the Joint Registrar was not right in dismissing the claim against the State Government, there being no substitution of the earlier contract. There is no substitution of contract as such and what has been considered in the meeting on 27.6.1977 is as to how the repayment should be made. There being no substitution of the contract and as the guarantee subsisted, R-3 Joint Registrar should have passed an award making the State Government jointly and severally liable to pay the decretal amount. He relied on the decision of the High Court of Himachal Pradesh in STATE BANK OF PATIALA VS. M/s SHRI DURGA OIL & FLOUR MILLS, MEHATPUR AND OTHERS (A.I.R. 1984 NOC 22 (Him.Pra.)) in *hr*

support of his contention that there is no substitution of contract.

Learned Govt. Pleader on the other hand contended that there is no guarantee at the first place as there is no written agreement and even if there was any such agreement that stands substituted by the proceedings held on 27.6.1977 and therefore the Government is not liable for payment of the amount. The approach by both the authorities below is just and proper and therefore in a writ proceeding those orders cannot be challenged.

8. On a careful consideration of the rival claims and also the material made available on record, I fail to understand *& and appropriate* the arguments advanced by the Learned Govt. Pleader. I find considerable merit in the arguments that the State of Karnataka stood guarantee for the repayment of loan advanced by the petitioner to R-1 and what has been considered on 27.6.1977 is only an arrangement as to how the overdue loan has to be repaid and there was absolutely no

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substitution of contract. Unless it is shown that there was substitution of contract, the guarantee does not stand discharged.

9. Annexure-F is the order in dispute No.B/JRL/DAM/32/1986-87. On considering the pleadings R-3 raises certain issues for consideration, one of them is whether the plaintiff proves that any liability or guarantee is in existence against defendant No.2, if so, to what extent? The first two issues relate to the maintainability and point of limitation. R-3 on considering the material placed before him holds that the dispute is maintainable and further holds that the dispute raised is within time. However, on issue No.3, it holds that what transpired on 27.6.1977 is only remedial nature and notwithstanding the guarantee petitioner cannot succeed against the State of Karnataka to recover the amount. It is this portion of the order that is materially questioned in this writ petition. In appeal, R-4 though holds that the Government guaranteed the repayment of loan, very surprisingly and curiously holds that the petitioner can proceed independently in the event

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of R-1's failure to make payment pursuant to the award in dispute. Thus, R-3 & 4 concurrently hold that there is a guarantee by the State Government, they do not hold that there is novation of contract. It is needless to say that unless it is shown that the original contract is modified without the knowledge of the guarantor or there is substitution of contract, the guarantor's liability does not stand ~~✓~~ discharged. Annexure-B is the proceedings of the Government of Mysore dated 22:11.1967. It clearly spells out that the Government stood guarantee for the repayment of the principle and the payment of interest on the loan to be advanced by the Mysore State Co-operative Apex Bank to the petitioner and another Co-operative institution, for being given to the Fishing Marketing Corporation in the District of Karwar. Annexure-C is the copy of the meeting dated 27.6.1977, Under Secretary to Government draws the proceedings. A close look at the proceedings does not demonstrate that the original guarantee stood modified or altered. On the other hand, what the documents Annexures-B and C would reveal is that the Government stood guarantee and in pursuance of the guarantee *hmv*

petitioner borrowed loan from the Apex Bank and advanced it to the federation in about the year 1967 and R-1 federation failed to repay together with agreed interest within time. It is only for this reason, the meeting is convened and programme or arrangement was arrived at in the presence of the concerned as to how the repayment should be made. In fact, representatives of all the co-operative institutions concerned were present when the State Government has taken a decision. Two terms and conditions are relevant for the purpose and they are 3 and 4, they read as follows:

"(iii) The DCC Banks should repay their overdues to the Apex Bank by concerting the present overdues into 5 year term loan and the Apex Bank should charge interest only at 9% per annum while the DCC Banks should charge 11% to the Federations.

(iv) The DCC Banks should give 8 years period to the Federations for repayment of their loan."

It is thereafter Annexure-D is sent and it clearly indicates that the petitioner revoked the guarantee and requested the State Government to pay the amount. It would also reveal that in the

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meeting of the Board of Directors on 12.12.1992 it was resolved to invoke the guarantee and only thereafter wrote a letter to the Government on 17.12.1992 asking the Government to repay as per the terms and conditions of the guarantee. The principle argument advanced by the learned Govt. Pleader is that there is no agreement in writing as such and therefore no liability can be attributed to the Government, I find no substance in this argument. Contract of guarantee can be either oral or written (Sec.126 of the Indian Contract Act). On the other hand, in the instant case, Annexure-B would reveal that the Government drew up proceeding undertaking to extend guarantee to repayment of the principle together with interest and the State Government is also a party to the proceedings drawn ~~on~~ on 27.6.1977. As I have said earlier that the terms and conditions of the original agreement are not modified or altered by the proceedings. In fact, it would reveal that the amount had already been advanced and there was a failure on the part of R-1 to repay it in instalments and according to petitioner it is only therefore certain arrangements were made to give certain

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concessions. Therefore, in the circumstances, R-3 was not right in rejecting the claim of the petitioner against the State Government. Finding on issue No.3 in the dispute is certainly not based on proper appreciation of the material, available. Both the authorities below have failed to consider the question of law with reference to facts of the case and therefore that requires to be set aside.

10. R-4 has also committed an error in holding that even after the failure to recover the amount from R-1, petitioner can independent of Sec.70, proceed to recover the dues from the State Government. The relevant observation reads thus:

"4. We have already in the appeal No.271/91 held that the appellant bank can take recourse to Sec.70 and then if un-successful in recovering the loan, the State Government guarantee can then be invoked. There is nothing wrong if Joint Registrar of Co-operative Societies has passed an order under Sec.70 of the Act without making the State Government responsible - it is for the appellant bank to invoke State Government guarantee independently of Sec.70 of the Act."

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Petitioner by issuing notice Annexure-D dated 10.10.1983 has invoked the guarantee and has requested the Government to pay the amount. There is nothing on record to show that the Government in fact made the debtor viz., R-1 to pay the amount nor on its failure made any payment towards the principal. It is only thereafter, petitioner raises the dispute. Both R-3 & 4 hold that the State Government guaranteed the repayment, but R-3 refuses to direct the State to pay the amount on the ground that what was transpired on 27.6.1977 is only a remedial measure and in appeal the tribunal says that the petitioner can proceed independently in the event of its failure to recover it from R-1. Both the findings are not proper and therefore needs to be set aside.

11. The next point urged by Sri. Hegde Hudlamane, learned counsel for the petitioner is that the courts below were not right in refusing to award penal interest. I find no substance in this argument. In the proceedings drawn ~~up~~ on 27.6.1977 it is clearly understood that petitioner would charge 11% to the federation and

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he should pay 9% to the State Apex Bank. It is not shown that the Apex Bank charged any overdue interest or penal interest. When we look at the whole thing, it would demonstrate that the petitioner has acted as an agent, collected the amount from the Apex Bank and paid it to the federation for being distributed amongst the fishermen for the purchase of boats, for the development of fishing activities in the District of North Kanara. Perhaps for this reason the understanding reached on 27.6.1977 makes provision for extra payment of 2% interest. In the circumstances, and as nothing is said in the proceedings dated 27.6.1977 regarding penal interest, claim of penal interest by the petitioner cannot be allowed.

12. In view of the reasons hereinabove stated, finding of R-3 in dispute that the petitioner cannot proceed against the State to recover the amount and the finding of R-4 in appeal that the petitioner can proceed independently against the State only in case of failure by R-1 to repay the amount cannot be sustained and accordingly they are set aside.

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13. In the result, rule issued by this court on 8.8.1994 is made absolute. Both R-1 & 2 are jointly and severally liable to pay the amount awarded by R-3 in dispute No. B/JRL/DAM/32/86-87 both towards the principal, interest and the arbitration charges as per Annexure-F. Order dismissing the appeal No. 277/91 dated 22.2.1994 is therefore set aside.

Sd/-
JUDGE

